IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. MATTHEW ERICH MANZANEDO, Petitioner.	2 CA-CR 2006-0411-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200201240

Honorable Stephen F. McCarville, Judge

REVIEW GRANTED; RELIEF DENIED

Harriette P. Levitt — Tucson
Attorney for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 A jury found petitioner Matthew Manzanedo guilty of assault with intent to incite a riot or participation in a riot and criminal damage, committed with two historical felony convictions. According to our published opinion affirming Manzanedo's convictions and sentences on appeal, the charges arose "from a prison riot at the Pinal County Detention Center in which two officers were assaulted and the prison sustained over $23,000 in damage. The trial court sentenced Manzanedo to concurrent, enhanced, aggravated prison

terms of ten and twenty-two years." *State v. Manzanedo*, 210 Ariz. 292, ¶ 1, 110 P.3d 1026, 1027 (App. 2005).

¶2 The present petition for review follows the trial court's denial of a petition for post-conviction relief Manzanedo filed pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. In his petition below, Manzanedo asserted three claims. First, he alleged the existence of newly discovered evidence entitling him to a new trial. Second, he asserted advisory counsel had been ineffective for not conducting an adequate pretrial investigation that might have unearthed a portion of what Manzanedo claims to be newly discovered evidence. And, third, he contended that discrepancies in various witnesses' testimony—both at Manzanedo's trial and at the subsequent trial of another inmate also involved in the riot—had effectively denied him due process of law by allowing the jury to find him guilty based on perjured testimony.

¶3 The trial court denied relief succinctly in a minute entry that states: "[T]here is no newly discovered evidence [that] entitles the defendant to relief. Further, the claims of ineffective assistance of counsel and due process violations are denied." We will not disturb a trial court's denial of post-conviction relief unless we find it clearly abused its discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶4 Manzanedo's claim of newly discovered evidence was twofold. First, he described a written log prepared during the riot "to memorialize which inmates were comitt[ing] specific acts." According to Manzanedo:

> Corporal Trejo wrote down information as various officers called out the names of the inmates and their activities to her.

> Additionally, several other officers wrote their own notes and handed [them] to Corporal Trejo.
>
> Trejo subsequently turned over the log book and the loose papers containing the other officers' notes to Captain Brown. Brown reviewed the log book. He subsequently turned at least some of it over to [a deputy, who] did not place the log book into evidence; he did not make copies of it and he subsequently lost it.

Manzanedo claims that, because of "serious discrepancies in testimony regarding [his] involvement [in the riot], the creation and subsequent disappearance of the log book constitutes newly discovered evidence" entitling him to a new trial. Second, he claims conflicts between testimony given at his trial and testimony at the subsequent trial of a different inmate, Chance Collins, suggest "the witnesses' memory of what various inmates did was altered to fit the particular case for which they were testifying" and likewise entitle Manzanedo to a new trial.

¶5 In *State v. Bilke*, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989), our supreme court discussed the requirements for a colorable claim of newly discovered evidence:

> A colorable claim in a newly-discovered evidence case is presented if the following five requirements are met: (1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial; (2) the motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention; (3) the evidence must not simply be cumulative or impeaching; (4) the evidence must be relevant to the case; (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

Accord State v. Apelt, 176 Ariz. 349, 369, 861 P.2d 634, 654 (1993).

¶6 In response to Manzanedo's petition below, the state cited portions of the trial court record reportedly reflecting that Manzanedo knew of the log book's existence both before and during trial. Those parts of the record have not been included in the partial record before us now. In their absence, we must assume the missing portions support the trial court's ruling. *State v. Zuck*, 134 Ariz. 509, 512-13, 658 P.2d 162, 165-66 (1982); *State v. Mendoza*, 181 Ariz. 472, 474, 891 P.2d 939, 941 (App. 1995); *State v. Wilson*, 179 Ariz. 17, 19 n.1, 875 P.2d 1322, 1324 n.1 (App. 1993). We thus presume the trial court found Manzanedo had indeed known of the log's existence before and during trial and consequently ruled correctly that neither the log nor its alleged disappearance qualified as newly discovered evidence for purposes of Rule 32.1(e).

¶7 According to Manzanedo, the case against his fellow inmate Collins proceeded to trial in January 2005, roughly nineteen months after Manzanedo's trial in May 2003. Because the conflicting testimony Manzanedo claims witnesses gave in Collins's trial did not exist in 2003, that testimony does not qualify as newly discovered evidence, which, by definition, must have been in existence at the time of Manzanedo's trial. *See Bilke*, 162 Ariz. at 52, 781 P.2d at 29; *State v. Sanchez*, 200 Ariz. 163, ¶ 11, 24 P.3d 610, 613-14 (App. 2001). In short, the record and the applicable law support the trial court's conclusion that no newly discovered evidence existed for purposes of Rule 32.1(e).

¶8 Manzanedo elected to forego counsel and to represent himself at trial. Apparently the court had initially appointed counsel, however, and that attorney remained as advisory counsel after Manzanedo chose to represent himself. Manzanedo claimed his

counsel had breached a duty to conduct an adequate pretrial investigation. Had counsel done so, Manzanedo claimed, he "might have been able to obtain a copy of the log book before it was permanently lost."

¶9 Manzanedo cited no authority for the proposition that ineffective assistance by advisory counsel is a legally cognizable claim. Even if it were and even if Manzanedo had made a colorable showing that advisory counsel's performance was deficient, Manzanedo did not allege specific prejudice by explaining how the log book itself, or evidence of its disappearance, would probably have changed the outcome of his trial and led to his acquittal. *See generally Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984) (proving ineffective assistance requires proof of both deficient performance and prejudice). We cannot say the trial court abused its discretion in summarily denying relief on Manzanedo's ineffective assistance claim.

¶10 Finally, Manzanedo claimed he had been denied due process of law because he was "convicted based on perjured testimony." Alternatively, he claimed he should be entitled to relief "based on the revelation that witnesses subsequently testified differently from at [sic] the original trial." And, citing *State v. Hickle*, 133 Ariz. 234, 650 P.2d 1216 (1982), he claimed the alleged discrepancies in the same witnesses' testimony between his trial and the subsequent trial of his fellow inmate constituted "newly discovered facts."

¶11 The facts in *Hickle* involved a pivotal witness's later recantation of testimony that had been crucial at the defendant's trial. *See id.* at 238, 650 P.2d at 1220. As the state pointed out in its response below, there was no similar recantation in this case, and

discrepancies—or apparent discrepancies—in testimony do not necessarily reflect, and do not by themselves establish, perjury. And unless Manzanedo's conviction was based on perjured testimony, the state argued, there was no due process violation. Although the trial court did not state its reasons for rejecting Manzanedo's claim that he had been denied due process as the result of perjured testimony, it is reasonable to assume the court found the discrepancies Manzanedo alleged did not establish perjury at his trial.

¶12 Determinations of witness credibility are the province of the trial court, and we will not disturb its determinations on review. *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996); *State v. Hunter*, 112 Ariz. 128, 129, 539 P.2d 885, 886 (1975). We defer to the trial court's implicit findings and are unable to say it clearly abused its discretion in denying post-conviction relief. Although we grant the petition for review, we deny relief.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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PHILIP G. ESPINOSA, Judge